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SEAH PEI YEE v. HAP SENG STAR SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 22 NCVC-1028-09-2012]
14 OCTOBER 2014

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CIVIL PROCEDURE: *Amendment – Writ and statement of claim – Application made subsequent to decision by Court of Appeal – Whether court functus officio once judgment or order approved and sealed – Whether application an attempt to abuse process of court – Whether High Court bound by Court of Appeal decision*

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The plaintiff filed an application to enter summary judgment against the defendant based on the writ and statement of claim ('SOC') which was allowed by the High Court. The High Court further allowed the plaintiff's application for leave to amend the sealed judgment and order dated 29 January 2013 ('encl. 53'). Dissatisfied, the defendant appealed to the Court of Appeal against the decision pertaining to encl. 53 which was allowed by the court. The plaintiff did not appeal against the decision of the Court of Appeal. Instead, the plaintiff filed the present application to amend the writ and SOC to clarify the amount claimed.

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Held (dismissing plaintiff's application):

(1) For the plaintiff to apply now to amend the writ and SOC to include the new amount was an exercise in futility and an abuse of the process of the court. The sums, together with the new sum for damages, were not expressly pleaded in the plaintiff's prayers for relief in the writ and SOC at the time when the court granted summary judgment to the plaintiff. The plaintiff's proposed amendments were in effect an attempt to have a second bite of the cherry. (paras 18 & 19)

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(2) The Court of Appeal had already allowed the defendant's appeal regarding encl. 53 and did not uphold the High Court's decision to amend and clarify the sums in the sealed judgment and order dated 29 January 2013. Once a judgment or order is approved, sealed and perfected, the court is *functus officio*. It would therefore be wrong to allow the plaintiff's application as the court was bound by the decision of the Court of Appeal. (paras 11 & 26)

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Case(s) referred to:

Amanah Merchant Bank Bhd v. Lim Tow Seng & Ors [1992] 1 CLJ 647; [1992] 2 CLJ (Rep) 55 HC ***(not foll)***

Gan Seng Biang v. Foremost Holdings Bhd [2012] 9 CLJ 308 CA ***(foll)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

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Seah Pei Yee v. Hap Seng Star Sdn Bhd [2013] 1 LNS 229 HC ***(refd)***

Seah Pei Yee v. Hap Seng Star Sdn Bhd [2013] 10 CLJ 696 HC ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(dist)***

Legislation referred to:
Rules of Court 2012, O. 20 r. 5(1)
Rules of the High Court 1980, O. 14

For the plaintiff - Alan Tan Fu Seng; M/s Joseph Ting & Co
For the prosecution - Yeoh Tung Seng; M/s Gan Partnership

Reported by S Barathi

JUDGMENT

Yeoh Wee Siam J:

Enclosure 83

[1] This is the plaintiff's notice of application ("application") for the following orders:

(1) The defendant be given leave to make amendments to the writ of summons ("writ") and statement of claim ("SOC") dated 3 September 2012;

(2) The writ and SOC dated 3 September 2012 be amended as underlined in red in the proposed amended writ and amended SOC as in Annexure A.

(3) No order as to costs; and

(4) Any other relief as deemed fit and appropriate by this Honourable Court.

Proposed Amendments To Writ And SOC

[2] In Annexure A, the proposed amendments, *inter alia*, are as follows:

In the writ.

Dan Plaintif menuntut:

(a) ...

(b) ...

~~(b)~~(c) RM86,227.83 ("Deposit tersebut") dan RM36,335.00 ("Ansuran Bulanan tersebut");

~~(c)~~(d) ...

In the SOC.

22. Plaintif telah hilang kepercayaan terhadap Defendan dan Kereta tersebut di mana Plaintif perlu melangsaikan hutang dengan pihak bank Plaintif untuk membatalkan pinjaman dan mendapatkan pinjaman baru untuk kereta lain. Oleh itu, Plaintif turut menuntut RM86,227.83 ("Deposit tersebut") dan RM36,335.00 ("Ansuran Bulanan tersebut") yang telah dibayar sebagai balasan untuk Kereta tersebut yang defektif.";

and

25. Oleh itu, Plaintif menuntut terhadap Defendan:

(a) ...

(b) ...

(c) RM86,227.83 ("Deposit tersebut") dan RM36,335.00 ("Ansuran Bulanan tersebut");

~~(c)~~(d) ...

In para. 20 of the proposed amendments to the SOC, the sum of "RM350,107.83" up to 12 June 2012 was inserted in the plaintiff's claim for damages.

Grounds Of Application

[3] The plaintiff relied on the following grounds for the application:

(a) Defendan sedar bahawa jumlah RM86,227.83 ("Deposit tersebut") dan RM36,335.00 ("Ansuran Bulanan tersebut") adalah tuntutan Plaintif yang telah diplidkan dalam Saman dan Pernyataan Tuntutan tersebut dan merupakan kesan yang sepatutnya daripada pemulangan kereta defektif Defendan kepada Defendan, namun Defendan tidak memulangkan Deposit tersebut dan Ansuran Bulanan tersebut yang telah dibayar oleh Plaintif kepada Defendan;

(b) Plaintif memperolehi suatu perintah Mahkamah pada 20.06.2013 ("Perintah tersebut") untuk meminda Penghakiman Terus tersebut agar mencerminkan niat Mahkamah. Walaubagaimanapun, Perintah tersebut telah diketepikan oleh Mahkamah Rayuan pada 12.11.2013 atas alasan bahawa, Deposit tersebut dan Ansuran Bulanan tersebut tidak diplidkan secara nyata dalam prayer/permohonan Writ Saman dan Pernyataan Tuntutan tersebut untuk membolehkan Mahkamah mengguna budi bicara menurut Aturan 20 Kaedah 11 Kaedah-Kaedah Mahkamah Tinggi 2012;

(c) Permohonan di sini adalah diperlukan untuk mengelakkan sebarang penaksiran Defendan yang memprejudiskan Plaintif dan Defendan tidak lagi mengelakkan daripada memulangkan Deposit tersebut dan Ansuran Bulanan tersebut kepada Plaintif;

(d) Defendan tidak diprejudiskan dan pindaan adalah berkenaan dengan kausa tindakan yang serupa tetapi isu-isu yang tidak diputuskan dalam Penghakiman Terus tersebut; dan/atau

(e) Terdapat kecicirian yang tidak disengajakan.

Court's Decision Given On 18 September 2014 Regarding Encl. 83

[4] The plaintiff's application is dismissed. Costs of RM5,000 are to be paid by the plaintiff to the defendant forthwith.

Grounds Of Decision

[5] On 29 January 2013 this court allowed the plaintiff's application in encl. 7 to enter summary judgment against the defendant based on the writ

and SOC (see grounds of judgment dated 13 February 2013 in [2013] 1 LNS 229; [2014] 10 MLJ 881). The defendant filed a notice of appeal to appeal against the decision but later withdrew the appeal.

[6] On 20 June 2013 this court further allowed the plaintiff's application in encl. 53 for leave to amend the sealed judgment and order dated 29 January 2013 (see grounds of judgment dated 27 June 2013 in [2013] 1 LNS 709; [2013] 10 CLJ 696).

[7] The defendant appealed against the decision of this court given on 20 June 2013.

[8] On 12 November 2013, the Court of Appeal allowed the defendant's appeal regarding encl. 53.

[9] The plaintiff did not appeal against the decision of the Court of Appeal regarding encl. 53. Instead, the plaintiff filed this application to amend the writ and SOC.

[10] The effect of the decision of the Court of Appeal given on 12 November 2013 is that the sealed judgment and order of this court given on 29 January 2013 cannot be amended subsequently by this court on 20 June 2013 to clarify the amounts claimed, in particular to include the deposit and monthly instalment paid by the plaintiff to the defendant. Therefore, the summary judgment and order dated 29 January 2013, originally given based on the plaintiff's writ and SOC, is maintained.

[11] In the light of the fact that the Court of Appeal had already allowed the defendant's appeal on encl. 53, in considering the present application, this court agrees with the submission of learned counsel for the defendant that once a judgment or order is approved, sealed and perfected, the court is *functus officio*.

[12] In *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92, the Federal Court stated:

> He had the same material before him at the first foreclosure proceeding and quite clearly he should have considered himself *functus officio* after having considered the contentions raised at this proceeding and refused to do anything about it on the ground of lack of jurisdiction and he should have left it to the respondent to commence a fresh action to set aside the foreclosure order on the ground of fraud.

[13] In *Gan Seng Biang v. Foremost Holdings Bhd* [2012] 9 CLJ 308 at p. 315, the Court of Appeal stated:

> However, upon reference to the actual report of the cases it became clear to us that those cases refer to the stage after judgment but before the judgment is perfected, in the sense that there is nothing left to be done after the judgment is sealed and perfected.

[14] Further, in pp. 316 and 317, the Court of Appeal observed the following:

> It can be seen therefore that in those two cases cited in the Supreme Court Practice referred to by the Court of Appeal in *Abdul Johari*'s case the judgment was not perfected judgment.
>
> That is not the case here. The application in enclosure 105 to re-amend the amended statement of claim came after the judgment has been perfected, in accordance with the amended statement of claim as it stood on the date of the decision on 25 November 2009.
>
> We therefore agreed with the learned High Court Judge that the court was longer in a position to grant leave for the re-amendment of the amended statement of claim.

[15] The position in the present case is on all fours with the matter in *Gan Seng Biang* (*supra*).

[16] In the present case, summary judgment had already been given based on the plaintiff's claim in the writ and SOC. The sealed and perfected judgment and order of this court dated 29 January 2013 is therefore a final order which disposes of the action. Thus, there is nothing else left in the writ and SOC for the court to decide further on.

[17] In fact, the defendant had already paid the judgment sum to the plaintiff fully. So there is no question that the plaintiff can now be allowed to amend the writ and SOC to enable her to claim further the deposit and monthly instalment. The additional sums to be claimed should have been included by way of an amendment to be made to the writ and SOC on application by the plaintiff before this court granted summary judgment in the plaintiff's favour. However, the plaintiff failed to make such an application.

[18] It is therefore an exercise in futility and in fact an abuse of the process of the court for the plaintiff to apply now to amend the writ and SOC to include in the plaintiff's claim the new amounts of RM86,227.83 as deposit and RM36,335 as the monthly instalment on the ground that these two sums were paid as consideration for the purchase of the car.

[19] These two sums, together with the new sum of RM350,107.83 as damages, were not pleaded expressly in the plaintiff's prayers for relief in the writ and SOC at the time when this court granted summary judgment to the plaintiff. The plaintiff's proposed amendments *via* this application are in effect an attempt to have a second bite of the cherry.

[20] The plaintiff relied on the Federal Court decision in *Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 where the appellant's appeal was allowed in order to amend the amended statement of claim.

[21] I am of the view that *Yamaha Motor* (*supra*) has to be distinguished from the present case. In that case, the amendment was to be made during the interlocutory stage of the proceedings where the action had not been decided by the court and no final order had been granted.

[22] In the present case, this court had already granted summary judgment and a final order had been given.

[23] Learned counsel for the plaintiff also relied on the case of *Amanah Merchant Bank Bhd v. Lim Tow Seng & Ors* [1992] 1 CLJ 647; [1992] 2 CLJ (Rep) 55 at p. 56 where after the final judgment under O. 14 has been entered against the defendants, the High Court allowed the amendment and held as follows:

> [3] Since amendment can be ordered at any stage of the proceeding so as to lay bare the nature of the issues at hand, I had allowed the plaintiff's oral application to amend the statement of claim by the inclusion of the provision of Clause 5 of the agreement.

[24] With utmost respect, I do not agree with the decision in *Amanah Merchant Bank* (*supra*). I am of the view that an amendment may be allowed at any stage of the proceedings under O. 20 r. 5(1) of the Rules of Court 2012 only for as long as there are still pending proceedings before the court. In the present case, there are no longer any pending proceedings before this court since a final order for the summary judgment had been given.

[25] I would abide by the principles enunciated in *Gan Seng Biang* (*supra*) which is a Court of Appeal decision, as opposed to the High Court decision in *Amanah Merchant Bank* (*supra*).

[26] Furthermore, it must be stressed that the Court of Appeal had on 12 November 2013 allowed the defendant's appeal regarding encl. 53. This means that the Court of Appeal did not uphold this court's decision given on 20 June 2013 to amend and clarify the sums in the sealed judgment and order dated 29 January 2013. This court is therefore bound by the said decision of the Court of Appeal. Therefore, it would be wrong for this court to allow the plaintiff's application in encl. 83.

[27] Learned counsel for the plaintiff submitted that the plaintiff is not applying to amend the sealed judgment and order dated 29 January 2013. Instead, the plaintiff is only seeking to amend the writ and SOC. This court is of the view that such argument holds no water, and is illogical, baseless and without merit. It makes no legal sense at all to amend the writ and SOC when the matter has already been adjudicated and decided by this court, and there is no other matter that is outstanding or pending for the court to decide on. There has to be finality to the plaintiff's claim in this same action.

[28] Based on the above considerations, the court ordered accordingly.